No. 80-961

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FEDERAL TRADE COMMISSION,
Petitioner,

v.

OFFICIAL AIRLINE GUIDES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENT OFFICIAL AIRLINE GUIDES, INC. IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do the antitrust laws, and thus Section 5 of the Federal Trade Commission Act, prohibit an alleged monopolist from unilaterally denying access to a resource which it controls, where such denial is not the result of any anticompetitive motive or intent, and has alleged competitive effects solely within a market in which the monopolist does not compete, if in the opinion of the Federal Trade Commission the "business justification" for the denial of access is inadequate?

In addition to this issue, which the Federal Trade Commission admits in its Petition for a Writ of Certiorari is "not likely to occur with great frequency," the following questions are presented for review by this Court if it grants the Petition:

2. Does the First Amendment to the Constitution of the United States bar an order by the Federal Trade Commission requiring the private, independent publisher of an informational directory to include certain information in its directory where it is admitted that the publisher had no anticompetitive motive or intent in previously excluding such information?

3. Does the Federal Trade Commission have subject matter jurisdiction under Section 5(a)(2) of the Federal Trade Commission Act over a case concerned exclusively with the regulation of competition among air carriers, which expressly are excluded from the Federal Trade Commission's jurisdiction by Section 5(a)(2)?

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STATUTES INVOLVED

Pertinent portions of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and Section 11 of the Clayton Act, 15 U.S.C. § 21, are set forth in Appendix A, *infra*.

STATEMENT

A. Introduction

The Reuben H. Donnelley Corporation ("Donnelley") is the publisher of the *Official Airline Guide* ("OAG"),[1] a

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[1] The Reuben H. Donnelley Corporation, a wholly-owned subsidiary of The Dun & Bradstreet Corporation, published the *Official Airline Guide* until January 1, 1979 when that responsibility

twice-monthly publication which combines into an informational directory the passenger flight schedules of substantially all of the scheduled air carriers operating in North America. On September 18, 1980, the United States Court of Appeals for the Second Circuit unanimously reversed a Federal Trade Commission ("FTC" or "Commission") order issued on January 10, 1980 directing Donnelley to publish in the OAG commuter air carrier connecting flight schedule listings. The publishing policy ordered by the FTC had been adopted by Donnelley, and the Commission had been so notified, in October 1975 (some six months prior to issuance of the FTC's complaint), had been implemented in 1976 and has continued in effect since then. (R. 23-30, 647).[2] Donnelley has no intention of changing its existing policy of publishing commuter air carrier connecting flight schedule listings, which is in full accord with the Commission's order. Accordingly, this case was moot as a matter of fact—if not as a matter of law—for more than three years prior to the entry of the Commission's order, and has now been factually moot for more than four years.

For many years, the OAG has published the direct flight schedule listings of the three legal classifications of scheduled air carriers—certificated, commuter and in-

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was assumed by Official Airline Guides, Inc., also a wholly-owned subsidiary of The Dun & Bradstreet Corporation. To avoid confusion, the publisher of the OAG will be referred to herein as "Donnelley" as it previously has been throughout the proceedings before the Federal Trade Commission and the federal courts.

[2] The following abbreviations are used for citations in this brief: (a) "R." refers to the Joint Appendix filed in the court of appeals; (b) "Pet." refers to the FTC's Petition for a Writ of Certiorari; (c) "App." refers to an appendix to the Petition; (d) "RX" refers to Donnelley's evidentiary exhibits admitted in the FTC proceedings; and (e) "CX" refers to the FTC staff's evidentiary exhibits admitted in the FTC proceedings.

trastate—in separate corresponding classifications under each city pair, with commuter and intrastate air carrier listings designated by the headings "Commuter Air Carriers" and "Intrastate Air Carriers." The classification of air carriers known as "commuter air carriers" was created by the Civil Aeronautics Board ("CAB") as a sub-category of "air taxis" in 1969, and these carriers were restricted to the operation of small aircraft in order to prevent them from competing with certificated air carriers. (R. 64). Commuter air carriers were intended by the CAB "to fill service gaps" in the schedules of certificated air carriers by providing "services with small aircraft [which are] fundamentally different from [those] of certificated operations," and which offer no serious competition to certificated air carriers.[3] *Part*

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[3] In 1974, commuter and certificated air carriers competed in, at most, eighty-two city pairs (R. 485), or 0.4% of the more than 20,000 city pairs shown as receiving scheduled air carrier service in the February 1, 1974 issue of the OAG. (CX 57-A). Moreover, even in these few instances there was no significant competition between the two classes of carriers since commuter air carriers generally are scheduled to fill gaps in the flight schedules of certificated air carriers, and where certificated and commuter air carrier scheduling is comparable, commuter air carriers are a distant second choice of travelers. (*See, e.g.*, R. 184, 391, 402-03). Nonetheless, in 1971 (five years before the OAG began publishing commuter air carrier connecting flight schedule listings), 70% of commuter air carrier passenger traffic was comprised of connecting passengers (Pet., App. A at 8a), reflecting the fact that users of the OAG were able to "construct a connection" using the OAG when a commuter air carrier flight was appropriate. (*See, e.g.*, R. 390).

The Petition incorrectly states that "as of April 1975, 432 pairs of cities were served by direct flights of commuter and certificated carriers operating in competition with each other . . . ." (Pet. at 3). The Commission's opinion, which the Petition cites, did not find that there was competition in 432 city pairs. It merely cited CX 135-E (R. 532), which shows only that 432 city pairs were *served*

298 Weight Limitation Investigation, CAB Order 72-7-61, p. 17 (1972), *aff'd sub nom., Hughes Aircraft Corp.* v. *CAB*, 492 F.2d 567 (D.C. Cir. 1973).

In 1971, an official of the OAG recommended to its chief executive officer that the OAG publish commuter air carrier connecting flight schedule listings and combine or "merge" the direct flight schedule listings of certificated and commuter air carriers. The OAG's chief executive rejected this recommendation, principally because of his concern as to the "reliability of the service performed by the commuter carriers as of this date both from a standpoint of adherence to schedules and safety." (Pet., App. C at 61a).[4] Prior to October 1975, Donnelley viewed the issue of publishing commuter air carrier connecting flight schedule listings as being tied to the issue of merging the direct flight schedule listings of all three

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by both commuter and certificated air carriers, not that there was any significant *competition* between the two classes of air carriers in those city pairs.

[4] The Commission's Petition asserts that, based on a March 1975 letter from Donnelley's executive vice-president to a commuter air carrier, Donnelley's "executives recognized that a 'disservice is being done' to commuter air carriers" by the absence of commuter air carrier connecting flight schedule listings in the OAG. (Pet. at 4). The Commission has quoted only a portion of the letter and distorted its meaning as a result. The letter observed in relevant part that:

> "[T]he fact that we do not show connecting service between commuter carriers and certificated carriers has been the subject of a great deal of discussion and writings during the last several years . . . . There are a number of very efficient and reliable commuter carriers to whom a disservice is being done . . . . Under the law, we must treat all carriers of one class, in this case commuter air carriers as designated by the CAB, exactly the same. Therefore, unless some further legal distinction can be made between the various commuter carriers, we remain unwilling to change our present listing policies as we feel we would be doing our subscribers a disservice." (RX 54).

classes of air carriers. Donnelley therefore initially determined not to publish such connecting flight schedule listings because it had decided not to merge the direct flight schedule listings. (*Id.* at 77a). In October 1975, for a number of reasons and in the exercise of its editorial judgment, Donnelley decided to begin publishing commuter air carrier connecting flight schedule listings and implemented this decision in December 1976.

B. The Decision of the Federal Trade Commission

In 1976, the FTC issued a complaint against Donnelley alleging that its refusal to combine the direct flight schedule listings of the three legal classifications of air carriers, and its previous refusal to publish in the OAG the connecting flight schedule listings of commuter and intrastate air carriers, had adversely affected competition in domestic scheduled passenger air transportation. (R. 12).

Ultimately, after prolonged administrative proceedings, the Commission held that Donnelley's conduct had not been based on any anticompetitive motive or intent. (Pet., App. C at 65a-66a). The FTC also held that "Donnelley had a substantial business justification for its separate listing policy," which was based on "Donnelley's belief that certificated carriers provide more reliable flight information for listing in the OAG, and are generally faster, safer, and more comfortable than commuter carriers." (Pet., App. C at 79a). The FTC thus upheld Donnelley's policy of publishing separately the direct flight schedule listings of certificated and commuter air carriers.[5]

However, the FTC found that Donnelley's policy prior to 1975 of not publishing commuter air carrier connecting flight schedule listings was "arbitrary," and had caused commuter air carriers "significant competitive injury." (Pet., App. C at 77a). On the asserted basis of

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[5] The FTC considered and rejected the claim that Donnelley's publishing policies had been the result of a conspiracy between it and various certificated air carriers. (Pet., App. C at 57a-64a).

the antitrust laws, the Commission's opinion sought to impose on a "monopolist" a new legal "duty not to be arbitrary," which would apply even when the challenged action had no anticompetitive motive or intent and did not result in any competitive benefit to the "monopolist." (*Id.* at 72a). The Commission held that Donnelley's prior policy of not publishing commuter air carrier connecting flight schedule listings violated this new legal duty (*id.* at 76a), was "inconsistent with the fundamental goals of antitrust" (*id.* at 73a) and that Donnelley thus had violated Section 5 of the FTC Act. (*Id.* at 77a).

In reaching this result, the Commission was remarkably candid in confronting the obstacle to its decision posed by the doctrine established in *United States* v. *Colgate & Co.*, 250 U.S. 300, 307 (1919), of "the long-recognized right of [a] trader . . . freely to exercise his own independent discretion as to parties with whom he will deal." Indeed, the FTC frankly declared its intention to disregard the applicability of *Colgate* to this case. The Commission stated that although "[t]he result here may be inconsistent to some extent with the theory of the *Colgate* doctrine, . . . we believe the philosophy of *Colgate* must give way to a limited extent where . . . business judgment is exercised by a monopolist in an arbitrary way." (Pet., App. C at 73a-74a n.37).

C. The Decision of the Court of Appeals

Donnelley petitioned for review of the Commission's order in the United States Court of Appeals for the Second Circuit, arguing that the order should be set aside on the grounds that (1) the FTC lacks subject matter jurisdiction in this case, (2) the First Amendment bars the Commission's order, (3) Donnelley's conduct had been entirely lawful under the antitrust laws, and (4) the Commission had failed to satisfy the legal standard governing entry of an order prohibiting conduct which had long since been terminated.

A panel of the court of appeals, consisting of Circuit Judges Oakes and Van Graafeiland and District Judge Nickerson (of the Eastern District of New York, sitting by designation), heard oral argument on June 17, 1980, and rendered a unanimous decision (opinion by Circuit Judge Oakes) on September 18, 1980. (Pet., App. A). The court of appeals held that the statutory exclusion of "air carriers" from the FTC's jurisdiction under Section 5(a)(2) of the FTC Act operates only *in personam* and does not otherwise limit the Commission's authority to regulate competition in the air carrier industry. (Pet., App. A at 5a-7a). The court also found that the Commission's order—had it been otherwise valid—would have been a proper prohibition of terminated conduct. (Pet., App. A at 16a).

However, the court of appeals rejected the novel "duty not to be arbitrary" which the FTC had attempted to create under the antitrust laws and reversed the Commission's order on the grounds that (1) such a duty was contrary to the *Colgate* doctrine; (2) the new duty was not supported by any previous decisions; and (3) "enforcement of the FTC's order here would give the FTC too much power to substitute its own business judgment . . . in any decision which arguably affects competition in another industry. Such a decision would permit the FTC to delve into . . . 'social, political or personal reasons' for a monopolist's refusal to deal." (Pet., App. A at 10a-15a). Due to this resolution of the antitrust issue, upon which the court of appeals based its reversal of the Commission's order, it did not reach the First Amendment issue. (Pet., App. A at 2a, 16a).

The Commission sought no further consideration of this case by the court of appeals subsequent to the panel's unanimous decision.

D. The Petition for a Writ of Certiorari

The Petition for a Writ of Certiorari concedes—as it must—that this case involves circumstances which "are not likely to occur with great frequency." (Pet. at 20). Nonetheless, the Commission now seeks review of the decision of the court of appeals striking down the new "duty" of a monopolist which the Commission had sought to establish under the antitrust laws. The Petition makes clear, as did the Commission's own opinion, that the asserted basis of the Commission's order is "the fundamental policy of the federal antitrust laws." (Pet. at 11). However, the Petition departs from the Commission's previously-consistent analysis of this case as one which, although concededly "outside the mainstream of law concerning monopolies" (Pet., App. C at 66a-67a), is based solely on antitrust law principles. Thus, the Petition urges that "this case presents an important question concerning the limits of the [FTC's] authority under Section 5 of the [FTC Act] to declare abuses of monopoly power 'unfair methods of competition.'" (Pet. at 10). The Petition then asserts that the court of appeals applied a "narrow interpretation" of that statute which is alleged to be inconsistent with "the broad standard of Section 5—a standard that Congress intended to be 'flexible'. . . . [citations omitted]." (Pet. at 21). The Petition thus invokes for the first time a purported basis for the Commission's order which is independent of recognized antitrust principles.

SUMMARY OF ARGUMENT

The Commission's Petition for a Writ of Certiorari presents no ground under Rule 17(1) of this Court's Rules for the issuance of the writ, nor does the Petition present any other matter warranting review by this Court. The Commission cannot now abandon the antitrust law basis of its order and substitute some other undefined and "flexible" basis, beyond the antitrust laws, which it purports to draw from the FTC Act. The ruling of the court of appeals clearly was correct, and the Commission's order is not supported by—and indeed is contrary to—all recognized antitrust law principles, particularly the doctrine established by this Court in *Colgate*. The Commission's attempt to impose a "duty not to be arbitrary" where only unilateral action is involved finds no support in cases involving joint refusals to deal, and this "duty" improperly would permit the FTC to substitute its judgment on business decisions for that of the businessmen involved. In addition, there is no conflict between the decision of the court of appeals in this case and any decision of any other United States Court of Appeals.

Moreover, even if the Commission's order were valid under the antitrust laws, it is barred by the First Amendment as an impermissible infringement of Donnelley's right freely to exercise its editorial judgment in the formulation of its publishing policies. Finally, the Commission lacks subject matter jurisdiction over competion among air carriers, and cannot subvert this jurisdictional limitation merely by proceeding, as it has here, against a party over which it has *in personam* jurisdiction.

ARGUMENT

1. Having failed in the court below to sustain its order on antitrust grounds, the Commission apparently now is attempting to convert this case—which both it and the court of appeals decided explicitly and solely on antitrust grounds—into one which presents an issue of the construction of the phrase "unfair methods of competition" in Section 5 of the FTC Act.[6] No such issue properly may be presented here. The FTC's opinion not only made no attempt to base its decision on any distinction between Section 5 and the antitrust laws, but indeed stated that the Commission saw no reason "why a similar duty would not arise under the Sherman Act." (Pet., App. C at 74a n.39). It is now too late in this case for the Commission to attempt to draw a distinction between the scope of Section 5 and that of the antitrust laws.

As this Court held in *FTC* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 247 (1972), where "[t]here is no indication in the Commission's opinion that it found [the challenged] conduct to be unfair in its effect on competitors because of considerations other than those at the root of the antitrust laws," its decision must be tested solely under those laws. Thus, having grounded its decision in

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[6] In its opinion, the Commission framed the question before it as "whether antitrust liability may attach" to Donnelley's conduct, a "policy issue" which, according to the FTC, "has perplexed antitrust *cognoscenti* for decades. . . ." (Pet., App. C at 24a). Moreover, in characterizing its decision, the Commission referred to "antitrust enforcement" and "antitrust enforcers" (*id.* at 73a-74a), and held that "the antitrust laws" could compel the action it had ordered. (*Id.* at 76a; *see also*, p. 11 n.7, *infra*). Although the Commission referred in passing to the "unfair methods of competition" phrase contained in Section 5 of the FTC Act (*id.* at 76a), it did not invoke that language as a basis for its decision independent of antitrust law principles. Nor has the Commission anywhere undertaken to explain how that language could apply to Donnelley, which is conceded to have had no anticompetitive motive or intent and indeed, according to the FTC, is a "monopolist."

this case on antitrust analysis, the FTC may not now shift its ground and seek to have Donnelley's conduct declared unlawful under Section 5 "because of considerations other than those at the root of the antitrust laws." [7] This Court established that fundamental principle long before *Sperry & Hutchinson*, holding in *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87 (1943), that "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."

2. It is clear that the Commission's order has no valid basis in the antitrust laws, and the court of appeals correctly decided the legal question presented by the FTC to this Court. As the Commission's opinion accurately pointed out, "this case differs from ordinary monopolization cases where challenged acts or practices were engaged in to benefit the monopolist competitively, either in the market in which the monopoly power existed or in some adjacent market into which the monopolist had extended its operations" (Pet., App. C at 65a), and "Donnelley's policies, which have affected competition in the air transportation market, were not intended to benefit Donnelley in that market." (*Id.* at 66a).

This case thus involves unilateral action by a company which the Commission concedes had no motive or purpose to affect competition in any line of commerce, and which did not affect competition in the market in which it is engaged. No case supports the FTC's effort to declare such

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[7] The Petition's comment that *Sperry & Hutchinson* "differs from this case" because the practices challenged there "were viewed as not violating either the letter or spirit of the antitrust laws" (Pet. at 14 n.16), in no way diminishes the fact that the Commission may not now attempt to shift the basis of its order in this case. Moreover, in comparing the practices involved in *Sperry & Hutchinson* to those challenged here, the Petition clearly acknowledges that the FTC's order was based on antitrust law considerations by alleging that Donnelley's conduct "undermined competitive conditions . . . *which the antitrust laws were unquestionably designed to protect.*" (*Id.*; emphasis added).

behavior a violation of the antitrust laws. To the contrary, as the court of appeals correctly ruled, *Colgate* supports the lawfulness of unilateral action by a monopolist to decide with whom it will deal so long as it has no purpose to restrain competition or to expand or enhance its monopoly. Moreover, as the court below noted but the FTC ignores, this Court last term reaffirmed the *Colgate* doctrine in *Reeves, Inc.* v. *Stake*, —— U.S. ——, 48 U.S.L.W. 4746, 4749 (June 19, 1980).

In arguing that the FTC should be able to pass upon the reasonableness of refusals to deal by alleged monopolists with no purpose of furthering their own monopolies, the FTC seeks to have this Court discard—as the FTC itself has already done—the principle enunciated in *Colgate* that "[t]he purpose of the Sherman Act is . . . in a word, to preserve the right of freedom to trade." (250 U.S. at 307). In its place, the Commission would install itself as a "Monday morning quarterback" reviewing the justification of business decisions made by alleged monopolists. The rejection by the court of appeals of the FTC's attempt to exercise such sweeping authority is consonant with this Court's decisions, and there is no reason for this Court to reconsider the principles expressed in *Colgate* and reaffirmed last term in *Reeves, Inc.* v. *Stake.*

3.a. The "duty not to be arbitrary" where only unilateral conduct is involved, which the FTC seeks to impose here, is not established by cases involving joint refusals to deal. The FTC previously has conceded this (Pet., App. C at 72a), although its Petition struggles to find some support in those decisions.[8] Moreover, the court of appeals clearly recognized that the cases involving joint refusals to deal, resulting in injury to the defendants' competitors, are inapposite to this case. (*See* Pet.,

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[8] The cases cited by the Petition are *United States* v. *Associated Press*, 52 F. Supp. 362, 373 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945); *United States* v. *Terminal Railroad Ass'n*, 224 U.S. 383 (1912); *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963). (Pet. at 9).

App. A at 12a). The Commission's assertion in its Petition that the court of appeals "disregarded these cases because they involved joint refusals to deal, rather than a unilateral refusal by a monopolist" (Pet. at 15), simply ignores the opinion of the court of appeals. In noting that these cases "involved joint refusals to deal resulting in injury to the *defendants'* competitors," the court below even went so far as to place in italics the word "*defendants.*" (Pet., App. A at 12a). The court then properly rejected the Commission's disingenuous plea that it is but "a small step" from cases declaring unlawful joint activity injuring the defendants' competitors, to a case imposing antitrust liability on unilateral behavior involving only a line of commerce in which the defendant is not engaged. (Pet., App. C at 72a).

3.b. The Commission also argues that the court of appeals erred in rejecting the Commission's effort to attach antitrust liability to the unilateral acts of a monopolist "because it believed that the Commission's view would extend Section 5 to troublesome cases in which refusals to deal are based on social, political or personal preference." (Pet. at 18). However, the court's concern clearly went beyond the "troublesome cases" referred to by the FTC, and the court properly held that the FTC is not authorized "to substitute its own business judgment" in *any* case. (Pet., App. A at 14a-15a). Although the Commission urges that its decision has "carefully defined limits" (Pet. at 18), those purported "limits" did not prevent the Commission in this case from simply disregarding the evidence showing that Donnelley's OAG publishing policies were motivated by the economic necessity to preserve the integrity of its publication.[9] The "carefully defined lim-

[9] The problems inherent in permitting the FTC to substitute its judgment for that of businessmen are clearly illustrated by this case. The FTC recognized that "Donnelley viewed the issue of listing commuter . . . connecting flights as being tied to the issue of merging the listings," and that Donnelley's decision against merger "was based on [its] belief that certificated carriers provide

its" claimed by the FTC thus plainly are insufficient protection against the Commission's unreasonable application of the protean standard it seeks to have this Court approve.

4. There is no conflict between the decision of the court of appeals and the decision in *LaPeyre* v. *FTC*, 366 F.2d 117 (5th Cir. 1966), which the FTC now apparently claims to be directly on point. *LaPeyre* is clearly distinguishable on its facts from this case. The Commission attempts to read out of *LaPeyre* the crucial fact that the price discrimination practiced by the family which held a monopoly on certain shrimp peeling machinery was intended "to protect their own interest as [Gulf Coast] shrimp canners . . . from the competition of the [Pacific Northwest shrimp] canners." (366 F.2d at 120). As the court below succinctly observed:

> "[T]he fact remains that the utilization of monopoly power in one market in *LaPeyre* resulted in discrimination and the curtailment of competition in another market in which the monopolist himself was also engaged, and this surely distinguishes *LaPeyre* from the present case." (Pet., App. A at 13a).

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more reliable flight information . . . and are generally faster, safer and more comfortable than commuter carriers." (Pet., App. C at 79a). The Commission's "arbitrariness" finding is thus based merely on its disagreement with Donnelley's past application of these reasons to the question of whether it should publish commuter air carrier connecting flight schedule listings, not with the validity of the reasons themselves. There is no proper basis for this substitution of the Commission's judgment for Donnelley's. All of Donnelley's publishing policies have been reasonably based on the legitimate business reasons noted by the Commission, and with which Donnelley "is vitally concerned" in publishing the OAG. (*Id.* at 39a). Where the line is to be drawn on any particular issue of publishing policy, such as the one involved here, should not be second-guessed by the FTC under the rubric of an "arbitrariness" determination as was done—and done incorrectly—in this case.

LaPeyre, which has been described as "a classic case of price discrimination," [10] has no application here.

The footnote dictum commenting on *LaPeyre* in *Fulton* v. *Hecht*, 580 F.2d 1243, 1248-49 n.2 (5th Cir. 1978), to which the Commission points (Pet. at 12), was essentially unrelated to the issue before that court, contains no rationale and offers no analytical support for the Commission's theory. There is thus no basis for the Commission's claim of a conflict between the *LaPeyre* decision and the decision of the court of appeals in this case.

5. In addition to its lack of any valid basis in the antitrust laws, the Commission's order compelling Donnelley to publish certain information in the OAG violates the First Amendment. A publisher which unilaterally declines to publish some material, without any anticompetitive motive or intent, cannot constitutionally be compelled —by the government or by any other party—to publish the material it has rejected. The Petition maintains lamely that "the Commission recognized that some refusals to deal based on social or political grounds may present difficult issues, requiring a balancing of interests under the First Amendment." (Pet. at 19-20). However, the Commission's opinion failed to perform even the most rudimentary balancing analysis.

Not surprisingly, the Commission ultimately concluded that the First Amendment provided no barrier to its compulsory publication order. It held that the OAG,

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[10] 3 P. Areeda and D. Turner, *Antitrust Law* 238-39. The same authors have commented with regard to *LaPeyre* that "the Commission's opinion does not command the reader's respect because it states or explores no rationale, and because it shows no awareness of the considerations bearing on the wisdom of requiring an integrated monopolist to deal with his rivals." (*Id.* at 239). Further, Professors Areeda and Turner noted that neither the rationale of Commissioner Elman (in a concurring opinion) nor that of the majority is "sufficient to make out a § 2 violation . . . [n]or should it be a violation of FTC Act § 5." (*Id.* at 239 n.10).

which it termed "a passive receptacle only for 'commercial' speech," was not "entitled to the same high level of protection that is applicable to other forms of speech" (Pet., App. C at 82a), and summarily denied the OAG any First Amendment protection whatsoever. Clearly, however, the OAG is a complex informational directory which involves the exercise of extensive editorial judgment, is much more than "a passive receptacle," and is more closely analogous to a newspaper than to advertising material which merely proposes a commercial transaction. Thus, the OAG is entitled to a relatively high level of constitutional protection. (*See, e.g., Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 761-73 (1976)).

This Court's decision in *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), establishes that the government, no matter how well-intentioned, may not compel the publication of material which a newspaper does not wish to publish. In that case, the Court struck down a state "right of reply" statute providing that a candidate for public office whose personal character or official record had been assailed by a newspaper could require that the newspaper publish, without charge, any reply the candidate might make. Even though this Court recognized that many newspapers are monopolists in their local markets (418 U.S. at 249 & n.13), it held that an enforceable right of access to a newspaper through governmental coercion violates the First Amendment.[11]

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[11] A number of lower courts have reached similar conclusions in comparable cases. *See Chicago Joint Board, Amalgamated Clothing Workers* v. *Chicago Tribune Co.*, 435 F.2d 470 (7th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971); *Associates & Aldrich Co.* v. *Times Mirror Co.*, 440 F.2d 133 (9th Cir. 1971); *Person* v. *New York Post Corp.*, 427 F. Supp. 1297 (E.D.N.Y.), *aff'd mem.*, 573 F.2d 1294 (2d Cir. 1977); *Mississippi Gay Alliance* v. *Goudelock*, 536 F.2d 1073 (5th Cir. 1976), *cert. denied*, 430 U.S. 982 (1977); *Gore Newspapers Co.* v. *Shevin*, 397 F. Supp. 1253, 1256 (S.D. Fla. 1975).

As Mr. Justice White observed in his concurring opinion (418 U.S. at 259):

> "*A newspaper or magazine is not a public utility subject to 'reasonable' governmental regulation* in matters affecting the exercise of journalistic judgment as to what shall be printed." (Emphasis added).

Neither of the cases cited by the Commission on this issue (*National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978), and *Lorain Journal Co.* v. *United States*, 342 U.S. 143 (1951) (Pet. at 20 n.23)), suggests that, in the absence of any anticompetitive motive or intent, the government can compel publication under the antitrust laws of material which a publisher chooses not to publish. Thus even if the Commission's order were found to be otherwise valid, it still would be barred as a violation of the First Amendment.

6. Finally, the FTC has no subject matter jurisdiction over competition among air carriers, the only line of commerce at issue in this case. Section 5(a)(2) of the FTC Act excludes from the FTC's jurisdiction "air carriers . . . subject to the Federal Aviation Act of 1958," and the FTC therefore has no jurisdiction over the subject of competition among air carriers. Obviously, Donnelley is not an air carrier and is not exempt from the FTC's *in personam* jurisdiction, and Donnelley has never contended otherwise. However, the Commission's admitted *in personam* jurisdiction over Donnelley is wholly irrelevant to the question of whether the FTC has jurisdiction over the *subject matter* of its proceeding here, which is competition among air carriers.

By excluding air carriers from the FTC's *in personam* jurisdiction under Section 5(a)(2) of the FTC Act, Congress clearly removed the subject of competition among air carriers from the FTC's jurisdiction, thus barring the FTC from proceeding against a non-carrier when its

only purpose is to regulate competition among air carriers. This is demonstrated by the closely analogous case of *Fruit Growers' Express Inc.* v. *FTC*, 274 F. 205 (7th Cir. 1921), *cert. dismissed*, 261 U.S. 629 (1923). There the court held that the FTC lacked subject matter jurisdiction to enforce the Clayton Act in a case arising from a contract between several rail carriers subject to the jurisdiction of the Interstate Commerce Commission, which were not parties to the FTC case, and the respondent in the FTC case, which was subject to the Commission's *in personam* jurisdiction. Section 11 of the Clayton Act, 15 U.S.C. § 21, excludes from the FTC's jurisdiction the same regulated businesses (banks, air carriers, surface carriers and communications carriers) excluded from its jurisdiction under Section 5(a)(2) of the FTC Act, and provides that jurisdiction to enforce the Clayton Act as to those businesses is vested in the appropriate federal regulatory agencies. The court held that Section 11 of the Clayton Act thus removed from the FTC's jurisdiction any case "where the facts involve common carriers, *or the business of common carriers* . . . ." (274 F. at 207; emphasis added). Subsequently, the FTC itself in *Crush International Ltd.*, 80 F.T.C. 1023, 1026 (1972), characterized *Fruit Growers' Express* as holding that the Commission was without subject matter jurisdiction over the business of regulated common carriers.[12]

On the basis of the analytical framework established by *Fruit Growers' Express*, the Commission in fact was held to lack subject matter jurisdiction over this case in *The Reuben H. Donnelley Corp.* v. *FTC*, [1977-2] Trade

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[12] The court below incorrectly and without explanation interpreted *Fruit Growers' Express* as resting solely on the ground that the carriers involved, over which the FTC lacked even *in personam* jurisdiction, were necessary parties to the Commission proceeding. (Pet., App. A at 6a-7a).

Cas. (CCH) ¶ 61,721 (N.D. Ill. 1977).[13] The court observed in *Donnelley* that Section 5 of the FTC Act and Section 11 of the Clayton Act "were intended to accomplish the same purpose" ([1977-2] Trade Cas. at 72,942) of exempting from both statutes four specific industries which are regulated by the specialized agencies Congress has created to determine, *inter alia*, the appropriate competitive relationships within each industry. Upon this basis, the court declared that ([1977-2] Trade Cas. at 72,943):

> "It is thus natural that Congress would wish to exempt these lines of commerce from the jurisdiction of an agency like the FTC, whose mandate is to promote free competition in the sectors of the economy not subject to such detailed regulation [citation omitted]. [*The FTC has*] *advanced no reason why Congress should have exempted the subject of competition between air carriers from the FTC's jurisdiction under the Clayton Act, and have given the same subject back to the FTC under § 5(a)(2) of the FTC Act while simultaneously depriving it of jurisdiction over the carriers themselves.*" (Emphasis added).

Neither the Commission nor the court of appeals has advanced any such reason, and it is apparent that none

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[13] This decision and the permanent injunction against the FTC's proceedings which the district court had entered were vacated subsequently on the ground that Donnelley had not exhausted its administrative remedies. *The Reuben H. Donnelley Corp.* v. *FTC*, [1977-2] Trade Cas. (CCH) ¶ 61, 783 (N.D. Ill. 1977). On cross-appeals, the United States Court of Appeals for the Seventh Circuit held that venue was improper in the Northern District of Illinois. *The Reuben H. Donnelley Corp.* v. *FTC*, 580 F.2d 264 (7th Cir. 1978). The case was then transferred to the United States District Court for the District of Columbia, where Donnelley's complaint again was dismissed on exhaustion grounds. Donnelley did not pursue the jurisdictional matter further at that time.

exists. If the Court grants a writ of certiorari in this case, it clearly should review the question of whether the Commission has jurisdiction over the subject matter of competition among air carriers before reaching the other questions presented here.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

Relevant Statutory Provisions

1. Section 5(a)(2) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(2), provides:

> "The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 57a(f)(3) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act 1921, as amended, except as provided in section 406(b) of said Act, from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce."

2. Section 11(a) of the Clayton Act, 15 U.S.C. § 21(a), provides in relevant part:

> "Authority to enforce compliance with sections 13, 14, 18 and 19 of this title by the persons respectively subject thereto is vested in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics Board where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce. . . ."